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Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL CLINGMAN, Secretary of the Oklahoma State Election Board; GLO HENLEY, Chairman of the Oklahoma State Election Board; KENNETH MONROE, Vice Chairman of the Oklahoma State Election Board; THOMAS E. PRINCE, Member of the Oklahoma State Election Board; and the OKLAHOMA STATE ELECTION BOARD,

Petitioners,

v.

ANDREA L. BEAVER; FLOYD TURNER; MINELLE L. BATSON; MARY Y. BURNETT; MICHAEL L. SEYMOUR; TERRY L. BEAVER; ROBERT T. MURPHY; SHARON LYNN ATHERTON; ROGER BLOXHAM; STEVE GALPIN; RICHARD P. PRAWDZIENSKI; MICHAEL A. CLEM; WHITNEY L. BOUTIN, JR.; CHRISTOPHER S. POWELL; CHARLES A. BURRIS; and the LIBERTARIAN PARTY OF OKLAHOMA, a/k/a LIBERTARIAN POLITICAL ORGANIZATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Plaintiffs/Respondents (the Libertarian Party of Oklahoma and individual registered Libertarian, Democratic, and Republican voters) filed suit challenging the constitutionality of Okla. Stat. tit. 26, §§1-104(A) and 1-104(B)(4), which prevented the Libertarian Party of Oklahoma (hereinafter referred to as the LPO) from inviting voters registered as members of other political parties from voting in the political party's primary and runoff elections. After the Court had turned down Respondents' request for a preliminary injunction as to the 2000 Primary Election, the Respondents filed an Amended Complaint noting that the LPO had passed by-laws and resolutions that would permit all registered Oklahoma voters to vote in any primary or runoff election conducted by the LPO in any future primary or runoff election conducted in Oklahoma for the LPO.

The current Oklahoma election law in question only permits political parties to allow voters registered in that party and Independent registered voters – if the party so chooses – to vote in the party's primary. Okla. Stat. tit. 26, §1-104. Because the LPO had run candidates in every presidential election year in Oklahoma from 1980 through 2000, and expected to do so in future Presidential elections, the party was desirous of having the issue resolved as to a party-option open primary for future elections. Specifically, the LPO and its members felt that opening up their primary and runoff elections to all registered voters in Oklahoma would help the party reach out to Libertarian-oriented voters of other political affiliations, produce a more viable Libertarian candidate for the General Election, create favorable publicity for the Libertarian Party, and encourage further expansion

and growth of the Libertarian philosophy. Also, it had been the experience of most Libertarians that many individuals not formally affiliated with the LPO share Libertarian views on certain issues so as to support the advancement of common objectives favored by the LPO. As is obvious from the Republican and Democratic Respondents in the instant case, there are a number of Oklahoma voters who are registered in political parties other than the LPO who wish to vote in the LPO's primary and runoff elections.

After a non-jury trial in the case at bar, the Trial Court found that the instant case was not moot because the LPO was likely to have primary elections in the future in Oklahoma, and, if the LPO were allowed to open its primary election to all voters at the individual voter's choice, each voter would only be able to receive one ballot selection in order to cast his or her vote. Further, the Trial Court found that a party-option open primary can help a minor party get established, the ranks of registered Independent, Republican, and Democratic voters in Oklahoma contain numerous voters who sympathize with the Libertarian Party, and the Trial " . . . Court is in a very poor position to assay the purity of the Libertarian voting electorate because the Libertarian registration roles are periodically purged, with the result that, to an inherently unmeasurable extent, voters who have Libertarian political inclinations will either come to rest on the role of unaffiliated voters or will register with one of the major parties for no reason other than to avoid repeatedly being purged to unaffiliated status." Petitioners' Pet. for Writ of Cert., App. 62.

Additionally, the Trial Court found there were 23 open primary states in the United States without party

registration, there were three states that had party registration which allowed party-option open primaries (viz.: Utah Code Ann., §20A-9-403; Alaska Stat. §15-25-010; and Rhode Island – by virtue of the decision in *Cool Moose Party v. State of Rhode Island*, 183 F.3d 80 (1st Cir. 1999)), and, in the 23 open primary states without party registration between 1976 and 2002, there were 41 Libertarian primary elections – only in one of which the Libertarian candidates garnered more than one percent of the total votes cast in all the primaries. Finally, in party-option open primaries conducted in other states where voters register with a political party (e.g., the Democratic Party in Utah in 2002), the Trial Court found that open primaries had been held without any evidence of confusion or harm.

As to Oklahoma, while 75 percent of the registered Republicans and 69 percent of the registered Democrats had not voted in their party's primary election in 2000, the Trial Court found that the extent to which cross-over voting (e.g., Republicans and Democrats voting in the Libertarian primary) would occur and the effect of the cross-over voting on the donor parties – if Oklahoma had a party-option open primary – is highly speculative, and that the Petitioners' fears for voter confusion, raiding, swamping, and administration difficulties as the result of a party-option open primary are paternalistic and not borne out by the evidence presented at trial. However, the Trial Court did find that because some primary elections of the Democratic and Republican parties in Oklahoma were decided by five percent or less of the vote, allowing some Republicans and Democrats to vote in the Libertarian Party primary might affect the outcome of the major party primaries. Therefore, the Trial Court upheld the semi-closed

primary system of Oklahoma because of the perceived effect the party-option open primary would have on other political parties and the State's justification of protecting political party integrity.

On appeal, the United States Court of Appeals for the Tenth Circuit reversed the decision of the Trial Court because the election laws in question impermissibly violated the Respondents' First Amendment rights to political association. In reaching its decision, the Tenth Circuit considered the case in conjunction with this Court's decisions in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). The Court not only used the balancing test set forth by this Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), but tempered its review by considering the severity of the burden placed on Respondents' rights by the election laws in question as dictated by this Court in *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

Petitioners timely filed a Petition for Writ of Certiorari in this Court. Because Petitioners offer no compelling reason for this Court to exercise its discretionary power to grant a Writ of Certiorari, as required by Supreme Court Rule 10, because there is no conflict in decisions between the Circuit Courts of Appeals, and because the Court of Appeals correctly applied existing law to the particular facts and circumstances in the case at bar, Petitioners' request for a Writ of Certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. The Court Should Not Grant Certiorari Based on a Party's Incorrect Assertion that the Court of Appeals Committed Error.

The Justices of this Court have repeatedly stressed that this Court's certiorari jurisdiction is not merely a mechanism for the correction of perceived errors by the lower federal courts. As " . . . the Rules of this Court make plain, our certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 n.5 (1981) (Stevens, J. concurring). Further, as Justice Frankfurter has written: "[C]ertiorari jurisdiction 'is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.'" *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 531 (1957) (Frankfurter, J. dissenting), quoting "*Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916). While the Tenth Circuit in the case below did declare unconstitutional Oklahoma's ban on party-option open primaries, the opinion is in no way in direct conflict with this Court's directives in *Tashjian v. Republican Party of Connecticut, Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *California Democratic Party v. Jones*, because the Tenth Circuit reached a decision based on the particular facts and circumstances set forth in the Trial Court. The Tenth Circuit noted that the record in the Trial Court below had found that both Utah and Alaska currently employed a party-option open primary system as urged by the LPO herein, and neither state had a problem with instability in its political process. *Beaver v. Clingman*, 363 F.3d 1048, 1060 (10th Cir. 2004).

The Petitioners misread the decision in *Tashjian* to mean that a party-option open primary may never be permitted. In fact, *Tashjian* did not rule on the issue of a party-option open primary as far as allowing members of other political parties to choose whether they wish to vote in their own party's primary or accept the invitation to vote in another party's primary election. As Justice Sutherland once wrote in noting that a point at issue had not been decided in a previous case: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Rather, footnote 13 in *Tashjian* is mere *dicta* and simply suggests that the Court – as the Tenth Circuit did – exercise caution in considering precisely what the proof was of the compelling state interest which might make it necessary for a state to forbid a party-option open primary. Just as in *Tashjian* the State failed to make its case in the record of the Trial Court as to why the State should be able to prevent a political party from allowing Independent voters to vote in the political party's primary, the record in the case below did not support the alleged interest of the State in banning a political party from inviting registered members of other political parties to vote in the inviting political party's primary. Therefore, the Tenth Circuit was correct in its ruling based on the particular circumstances, facts, and record in the case below – as was the First Circuit in the similar case of *Cool Moose Party v. State of Rhode Island*. Rather than disregarding the language of *Tashjian* as Petitioners contend, the Tenth Circuit herein specifically followed the guidance and teaching of *Tashjian* in considering its decision.

As to *Rosario v. Rockefeller*, the Tenth Circuit commented on the concern in *Rosario* " . . . to prevent 'party raiding' which was defined by this court as a process in which dedicated members of one party switched to another political party in an attempt to alter the outcome of the second party's primary." Petitioners turn the concern in *Rosario* on its head by assuming that the party to be protected is the party from which the voters come from rather than from the party in which they are going to vote in its party primary. *Rosario* stands for the proposition that the state may properly protect a party from voters switching over to a party which does not invite them into its primary, as opposed to the instant case where the party is extending an invitation to voters of other political parties. Petitioners simply misunderstand that the danger of party raiding in *Rosario* is a danger to a party receiving new voters which only that political party is in a best position to judge whether it is a danger it wishes to be protected from. Likewise, a different issue was involved in *Storer v. Brown*, 415 U.S. 724 (1974), than in the instant case, wherein the law in question involved a political party disaffiliation requirement in order to run as an Independent candidate.

Even the Trial Court noted in its decision below, " . . . the *party option* feature of plaintiffs' proposed format for open primaries undermines potent arguments which might otherwise be advanced in support of the challenged legislation." See Petitioners' Pet. for Writ of Cert., App. 57. The Trial Court then went on to note that *Tashjian* stood in stark contrast with *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn. 1976), *summarily aff'd*, 429 U.S. 989 (1976), because in the *Nader* case, unlike in *Tashjian*, the Republican Party opposed the Plaintiff's effort to participate in

the party's primary. *Tashjian,* 479 U.S. at 212. As the Trial Court in the instant case then stated, "The granting or withholding of a party's consent to participation in its primary by strangers is clearly significant for First Amendment purposes." Petitioners' Pet. for Writ of Cert., App. 57. The Petitioners simply do not understand the fundamental right of freedom of political association " . . . which at its core protects against state regulations that: (1) preclude association, *Roberts v. United States Jaycees,* 468 U.S. 609, 622 . . . (1984); or (2) 'force [] inclusion of an unwanted person in a group.'" *Boy Scouts of America v. Dale,* 530 U.S. 640, 648 . . . (2000). *Beaver v. Clingman,* 363 F.3d at 1060-1061. Political parties do not own their members.

Finally, the decision of this Court in *California Democratic Party v. Jones* is in no way contrary to the decision of the Tenth Circuit in the case at bar. In fact, the Tenth Circuit Court of Appeals noted that the instant case was squarely between the cases of *Tashjian* and *California Democratic Party v. Jones*. Just as *Tashjian* had required the Connecticut regulation in question to be narrowly tailored to advance a compelling state interest, *Tashjian,* 479 U.S. at 217, the Tenth Circuit also noted that *Jones* required California to demonstrate that its regulations were narrowly tailored to serve a compelling state interest and on the record found that none of the interests were sufficiently compelling. *California Democratic Party v. Jones,* 530 U.S. at 581-82, 586. Rather than misreading this Court's decision in *Jones,* it is clear that the Tenth Circuit carefully considered *Jones* and *Tashjian* and looked to the record in the case below in reaching its decision.– Petitioner misstates the basis of the Tenth Circuit's decision by oversimplifying the decision and

overlooking the exact reasoning and considerations relied upon by the Tenth Circuit.

II. Petitioners Have Not Articulated a Compelling Reason to Justify Discretionary Review by this Court Because Petitioners Misunderstand the Effect of this Court's Decision in *California Democratic Party v. Jones.*

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Petitioners have not presented any compelling reason for this Court to exercise discretionary jurisdiction in the case at bar. In search of a compelling reason for the grant of certiorari, Petitioners set up a "straw man argument" by alleging that the Tenth Circuit Court of Appeals determined that *California Democratic Party v. Jones* " . . . requires a state in all partisan primaries to forego any regulation of a political party. . . . ", and to let the political party determine " . . . as to which voters the party will allow to vote in its primary." Petitioners' Pet. for Writ of Cert., at 14.

However, a close review of the Tenth Circuit's decision below shows that Petitioners' aforesaid allegation is a gross simplification. Rather, it is clear from looking at the Tenth Circuit's decision in *Beaver v. Clingman* that the Court full well understood that blanket and open primaries are not *per se* unconstitutional unless they conflict with a choice made by a political party. Further, it is equally clear that the Tenth Circuit understood that each case had to be analyzed under the particular circumstances and evidence presented in the record. The issue in *Jones* (as well as the instant case) is one of choice, not one

of absolute rules as to what kind of primary can be conducted.

The Tenth Circuit further noted that between the cases of *Tashjian*, *Jones*, and the instant case runs a "connecting thread" because in " . . . each of the three cases, the regulation at issue restricted the options of parties seeking to define the scope of their associational rights." *Beaver v. Clingman*, 363 F.3d at 1057. Further, the Tenth Circuit in citing to the *Jones* case noted that while a state has " . . . a compelling interest in political stability as a general matter, . . . our task is to examine whether '*in the circumstances of this case*,' [that interest is] compelling." *Beaver*, 363 F.3d at 1059, citing *Jones*, 530 U.S. at 584. Unlike Petitioners herein, the Tenth Circuit below recognized the complexity of the analysis required in *Jones* necessitated a look at the facts and circumstances in the record of the case at bar. Thus, the Tenth Circuit stated that " . . . Oklahoma's interest on this record and in the circumstances of this case is not a compelling one." *Beaver*, 363 F.3d at 1060.

III. The Tenth Circuit Court of Appeals Did Not Err in Deciding this Case.

The Tenth Circuit properly followed this Court's decisions in *California Democratic Party v. Jones* and *Tashjian v. Republican Party of Connecticut*. Petitioners, not the Tenth Circuit, have misinterpreted *California Democratic Party v. Jones* and *Tashjian*. Further, the particular facts in the record as developed in the Trial Court below did not support the alleged interest of the State in opposing a party-option open primary.

Finally, the Tenth Circuit correctly found that when a state attempts to regulate and control the boundaries which a political party wishes to exercise for its own primary election, the burden on associational rights is severe. In citing a number of decisions of this Court, the Tenth Circuit noted below that when states attempt to restrict political parties from defining the bounds of their own association, this Court closely scrutinizes the State's attempted regulation of the political party's rights to political association. *Beaver*, 363 F.3d at 1056; *Jones*, 530 U.S. 567, 582; *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 225 (1989); *Tashjian*, 479 U.S. at 225; *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107, 124 (1981), and *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975). While the Tenth Circuit did recognize that in *Timmons v. Twin Cities Area New Party*, this Court had employed an intermediate scrutiny when analyzing Minnesota's prohibition of fusion candidacies, the issue in *Timmons* involved a right to candidacy issue and would still have allowed voters to vote for the candidate of their choice as opposed to the instant case. While *Timmons* involved a request to consider fusion candidacies and a candidate's choice of which party to associate with as a candidate, the instant case involves the issue of choice for individual voters. *Timmons* and the case at bar would only be analogous if Respondents herein had requested the right of fusion voting, i.e., voting in a voter's registered political party (e.g., Republican or Democratic) and at the same primary voting in the primary of the LPO.

CONCLUSION

The decision below does not conflict with a decision of this Court or any Court of Appeals. Two Courts of Appeals have now considered the precise question presented here, and, based on the records presented to the First Circuit in *Cool Moose* and the Tenth Circuit in *Beaver*, both Circuit Courts have reached the identical conclusion: a political party may at its option open its political primary to voters from other political parties if the record does not establish a compelling interest on the part of the state.

Because Petitioners offer no compelling reason for this Court to exercise its discretionary power to grant a Writ of Certiorari, as required by Supreme Court Rule 10, because there is no conflict between Circuit Courts of Appeals and their decisions, and because the Court of Appeals correctly applied existing law to the case, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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